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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949.

No. .....

BURLINGTON TRANSPORTATION COMPANY,
PETITIONER,

vs.

EARL C. STOLTZ, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, and SUPPORTING BRIEF.

SUMMARY AND STATEMENT OF MATTER INVOLVED.

Petitioner's bus was involved in an accident in Utah, resulting in the death of Donald Stoltz, who was the son of Respondent, Earl C. Stoltz. The Respondent is a citizen of Colorado, as was deceased. Respondent sued in the United States District Court for the District of Colorado, for $25,000. The Colorado death statute limits recovery to a maximum

of $5,000. The Utah constitution and statute places no limitation on the amount of damages.

Petitioner filed a motion in the District Court seeking to limit the damages to $5,000, on the grounds that the laws of Utah, upon which the action was based, were opposed to and incompatible with the declared public policy of the laws of the State of Colorado, and that any general rule of comity does not apply in view of such declared public policy of Colorado.

The District Court judge held that at the proper time he would instruct the jury that recovery, if any, cannot exceed the maximum of $5,000.

Next came the pre-trial conference where Petitioner stated that it was willing to pay $5,000 and costs, and that a trial was therefore not necessary. Judgment was accordingly entered against Petitioner for $5,000 and costs, over Respondent's objections.

Respondent appealed to United States Court of Appeals, Tenth Circuit, from the judgment limited to $5,000 and costs, where, on December 15, 1949, it was held that the laws of Utah govern the amount of damages, and the trial court was reversed and the case remanded. Thereafter, a mandate for the trial was issued, and the trial court set a further pre-trial conference for February 16, 1950. Petitioner ordered the record from the clerk of the United States Court of Appeals for the purpose of this Petition, and the pre-trial conference was vacated, but Respondent is seeking to have it reinstated.

BASIS OF JURISDICTION.

This Court's jurisdiction is invoked under Revised Rules of the Supreme Court of the United States, Rule 38, Section 5, and 5 (b) under which Petitioner contends that the Court of Appeals has decided an important question of

local law in a way probably in conflict with applicable local decisions and statute; and in a way in conflict with decisions of the Supreme Court of the United States which decisions are themselves in conflict with each other.

This Petition, with supporting brief, is being filed within ninety days after the filing of the opinion of the United States Court of Appeals.

QUESTION PRESENTED.

The question presented is whether the Court of Appeals erred in holding that the United States District Court for the District of Colorado, where the action is pending, has to proceed with the trial under the opinion of the Court of Appeals which holds that the laws of Utah shall prevail, disregarding the Colorado statutory limit of $5,000, which limit has been by the Colorado statute and decisions, declared to be the public policy of Colorado, the violation of which would be repugnant, and abhorrent to, and incompatible with, the fixed and declared public policy of Colorado, of which the United States District Court for the District of Colorado, and the United States Court of Appeals should take cognizance and should follow.

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

Respondent has chosen to invoke the jurisdiction of the United States District Court of Colorado, and has done so with full knowledge of the limitation of the Colorado law limiting the damages; yet he also seeks to invoke the benefit of Utah's unlimited damages. The Colorado Federal Court was bound to enforce the positive statute of the state where the suit is pending, Colorado, and to follow the decisions of the Colorado Supreme Court. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or general, be

they commercial law or a part of the law of torts. The authority and only authority is the State, and if that be so, the voice adopted by the State as its own (whether it be of its Legislature or of its Supreme Court) should utter the last word. A federal court in a diversity case should consider itself in effect only another court of the state. A statutory limit by the law of the forum on the amount that can be recovered in a court of that state for death, irrespective of the place of wrong, should be enforced. As to the remedy, that is, the amount of damages, the law of the forum, where the action is brought or lex fori, should prevail.

To support what we have said here, we file herewith a supporting brief.

Wherefore, petitioner respectfully prays this Court to issue its Writ of Certiorari to review this case, and for all further proper orders.

Respectfully submitted,

H. Berman,
Joseph N. Lilly,
A. X. Erickson, A X Erickson 3-28-3
720 University Bldg.,
Denver, Colorado,
Attorneys for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1949.

No. .....

BURLINGTON TRANSPORTATION COMPANY,
PETITIONER,

vs.

EARL C. STOLTZ, RESPONDENT.

PETITIONER'S BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

REFERENCE TO OFFICIAL REPORTS OF OPINIONS BELOW.

The opinion of the United States District Court for the District of Colorado is not reported but is found at pages 5, 6, 7, of the record. The opinion of the United States Court of Appeals is reported in 178 Federal, 2nd Series 514, and is found at pages 13, 14, 15, of the record.

STATEMENT OF GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED.

This Court's jurisdiction is invoked under Revised Rules of the Supreme Court of the United States, Rule 38, Section 5, and 5 (b) under which Petitioner contends that the Court of Appeals has decided an important question of local law in a way probably in conflict with applicable local decisions and statute; and in a way in conflict with decisions of the Supreme Court of the United States which decisions are themselves in conflict with each other.

STATEMENT OF THE CASE.

Petitioner's bus was involved in an accident in Utah, resulting in the death of Donald Stoltz, who was the son of Respondent, Earl C. Stoltz. The Respondent is a citizen of Colorado, as was deceased. Respondent sued in the United States District Court for the District of Colorado, for $25,000. The Colorado death statute limits recovery to a maximum of $5,000. The Utah constitution and statute places no limitation on the amount of damages.

Petitioner filed a motion in the District Court seeking to limit the damages to $5,000, on the grounds that the laws of Utah, upon which the action was based, were opposed to and incompatible with the declared public policy of the laws of the State of Colorado, and that any general rule of comity does not apply in view of such declared public policy of Colorado.

The District Court judge held that at the proper time he would instruct the jury that recovery, if any, cannot exceed the maximum of $5,000.

Next came the pre-trial conference where Petitioner stated that it was willing to pay $5,000 and costs, and that a trial was therefore not necessary. Judgment was accordingly entered against Petitioner for $5,000 and costs, over Respondent's objections.

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SPECIFICATION OF ERROR.

The United States Court of Appeals erred in holding that the respondent is entitled to damages under the laws of Utah, and is not limited to the $5,000 damages being the maximum recoverable under the laws of Colorado.

ARGUMENT.

Article 16, § 5 of the Utah Constitution provides:

> "The right of action to recover damages for injuries resulting in death, shall never be abrogated, and the amount recoverable shall not be subject to any statutory limitation, except in cases where compensation for injuries resulting in death is provided for by law."

Title 104, Chap. 3, § 10, Code of Utah, 1943, provides that a father may maintain an action for the death of a minor child, where such death is caused by the wrongful act or neglect of another.

Colorado Statutes Annotated, 1935, Chap. 50, § 2, provides:

> "Whenever the death of a person shall be caused by a wrongful act, neglect or default of another, and

the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then * * * the person who, * * * if death had not ensued, shall be liable to an action for damages * * *."

Section 3 of the same title and chapter provides that: "* * * in every such action the jury may give such damages as they may deem fair and just, not exceeding five thousand (5,000) dollars * * *."

The Colorado public policy has been declared not only by the statute heretofore mentioned, but by cases construing it. Thus in Moffatt v. Tenney, 17 Colo. 189, 198, 30 Pacific 348, the Colorado Supreme Court clearly indicated that the statutory maximum reflects the public policy of the commonwealth: "* * * lest the courts should be troubled with excessive verdicts which might be supposed to rest upon a vindictive basis, they (the legislative) placed an absolute limit upon the recovery in the class of actions thus authorized."

If there is a rule of Comity permitting an action to be brought in another state, based on the substantive law of the state where the accident occurred, such rule bears with it the well recognized exception that the law of the forum where the action is pending governs as to the limitation of the amount of damages.

For many years the Federal courts held that they did not have to apply the unwritten law of the state where the suit was pending, and could disregard such laws as declared by the highest court in that state, and that the Federal Court could exercise its independent judgment as to what the common law of a state was or should be. But in the famous case of Erie Railroad Co. vs. Tomkins, 304 U. S. 64, 58 Supreme Court Reporter 817, this law which had existed since 1842 was changed. The case involved a suit for per-

sonal injuries. The accident occurred in Pennsylvania. The suit was brought in the Federal court in New York. Justice Brandeis wrote the opinion. He decided that the New York Federal court was bound, as before, to enforce the positive statutes of the state where the suit was pending, but he also decided, and differently from the law existing before, that the decisions of the state court where the suit was pending should be followed by the Federal court. Speaking of the law of the state where the suit was pending, the court held: "And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or general, be they commercial law or a part of the law of torts." "The authority and only authority is the State, and if that be so, the voice adopted by the State as its own (whether it be of its Legislature or of its Supreme Court) should utter the last word."

The State of Colorado, by its positive statute has declared its public policy to prohibit recovery of more than $5,000 in a death case. In Turnbull v. Cole, 70 Colo. 364, 201 Pacific 887, the Supreme Court of Colorado has decided that "the contract, though valid in Utah, could not be enforced in this state, because such action would be contrary to public policy • • • ."

Opinions have changed, to support our contention, since and because of the Erie decision in 1938. In Guarantee Trust Company v. York, 326 U. S. 99, decided in 1945, the court said it would put aside abstractions regarding substance and procedure, and that a federal court in a diversity case should consider itself "in effect only another court of the state."

In Beneficial Industrial Loan Corporation vs. Smith, 170 F. (2d) 44, the court said it could not concern itself with ancient diversities between adjective and substantive law,

but that a federal court "must enforce state law and state policy."

In the case involving the Titanic sinking, Oceanic Steam v. Mellor, 233 U.S. 718, 732, 34 Sup. Ct. Rep. 754, Justice Holmes said "It is also true that the laws of the forum may decline altogether to enforce that obligation on the ground that it is contrary to the domestic policy, or may decline to enforce it except within such limits as it may impose." • • • "parties resorting to our courts shall recover only to such extent or in such way as it may mark out."

The opinion of the United States Court of Appeals states at the top of page 15 of the printed record that the "amount of recovery is governed by the lex loci and not by the lex fori," citing at the bottom of page 15 of the printed record Section 391 of Restatement, Conflict of Laws, but the opinion utterly disregards the fact that in Restatement of the Law, Conflict of Laws, c. 9, Section 417, page 498, of American Law Institute, it says: "A statutory limit by the law of the forum on the amount that can be recovered in a court of that state for death, *irrespective of the place of wrong will, however, be enforced.*" (Italics ours.)

In the same volume it is said at page 723:

> "If a statute of the forum limits the amount which in any action of a certain class may be recovered in its courts, no greater amount can be recovered though under the law of the state which created this cause of action, a greater recovery would be justified or required."

And at page 723 and 724 in the same volume, it is said:

> "By a statute of state X, no more than five thousand dollars damages can be allowed in an action for the death of a human being. This has been interpreted by the courts of X to apply to all actions for death

brought in X. A court in X will refuse to allow greater recovery than five thousand dollars for a death caused in state Y, whose statute has no such limitation."

The Court of Appeals at the bottom of page 15 of the printed record refers to some state court decisions, but if such decisions are to be considered, then we submit as supporting our contention the leading case of Wooden vs. Western N. Y. R. R., 126 N. Y. 10, 26 N. E. 1050, 13 L.R.A. 458. The suit was in New York. The complaint alleged that the death was in Pennsylvania and that the statutes were similar. Judgment was demanded for $20,000. Defendant demurred. The court said the statutes were similar "but the second difference relied on is that in Pennsylvania there is no restriction upon the amount of damages which may be recovered, while in our State they cannot exceed $5,000. That restriction pertains to the remedy rather than the right. Dennick v. West Jersey, 103 U. S. 11, 26 L. Ed. 439. It is a limitation upon the discretion of the jury in fixing the amount of damages, but not upon the right of action or its inherent elements and character. The restriction indicates our public policy as to the extent of the remedy, and the plaintiff who chooses to avail herself of our remedial procedure must submit to our remedial limitations, and be content with a judgment beyond which our courts cannot go. They cannot exceed it in a case arising here, and no principle of comity requires them to enlarge the remedy which the plaintiff voluntarily seeks."

It therefore appears that the cause of action itself can be based on the law of the place where the accident occurred, that is, the lex loci, but as to the remedy, that is, the amount of damages, the law of the forum where the action is brought or lex fori, prevails. So it was said in Armbruster vs. Chicago R. R., 166 Iowa 155, 147 N. W. 337. The action was brought in Iowa, for a death in Missouri. The Missouri statute is almost like Colorado's except the damages were limited

to $10,000. The court quoted with approval from Minor on Conflict of Laws: "Occasionally some point may arise under differences between the lex delicti and the lex fori as to the elements to be taken into consideration in estimating the amount of damages. Such matters pertain to the remedy, and are to be controlled by the lex fori, since they do not involve any substantive right."

The Court of Appeals in its footnote (page 15, printed record) cites Northern Pac. R. Co. v. Babcock, 154 U. S. 190, 38 L. Ed. 958. The accident happened in Montana, the suit was in Minnesota. The court charged the jury "Many states have different laws. The law in this State until recently was that only $5,000 could be given in a case of death. It has lately been increased to $10,000." The verdict was $10,000. What the court would have done had the verdict been over $10,000 we do not know. The Supreme Court did quote from a Minnesota case, with approval, as follows: "The statute of another state has, of course, no extra-territorial force, but rights acquired under it will always, in comity, be enforced, *if not against the public policy of the laws of the former.*" (Italics ours.)

In the Babcock case the defendant had contended that "It seems this action could have been brought in either Montana or Minnesota. The party had his selection as to the forum; that being so, it is but right and proper he should have only the remedy afforded by the law of the forum of his selection. Wharton, Conflict of Law, Section 479, 747-754; Gould's Pleading, 104-112, 131, et seq.; Story, Conflict of Law, Section 556, et seq.; Nonce v. Richmond & Danville Railroad, 33 Fed. Rep. 429."

We have quoted from the opinion by Mr. Justice Holmes in the Titanic sinking case, supra, which quotation supports our contention. Yet there seems to be hopeless confusion as to what is the true rule. Thus, in Western Union v. Brown, 234 U. S. 542, 58 L. Ed. 1457-1459, Mr. Justice

Holmes said "when a person recovers in one jurisdiction for a tort committed in another, he does so on the ground of an obligation incurred at the place of the tort * * * and that is not only the ground but the measure of the maximum recovery." But in the same case Mr. Justice Holmes also says that "a limitation of liability may stand on different grounds", citing the abovementioned Titanic sinking case.

We cannot see any significance in the next to last paragraph of the opinion of the Court of Appeals (page 15, printed record) where it is stated that the Colorado statutory limitation does not purport to apply to actions brought under a statute of another state. The statute is silent on that subject, but surely the silence does not give consent to disobey the solemn declaration that "in every such action the jury may give such damages as they may deem fair and just, not exceeding five thousand (5,000) dollars." (Page 14, printed record.) It is plain that the language means any jury within the limits of the state. The Utah constitution and statute is silent as to where it applies, but it must mean to apply to juries in Utah. Surely the people of Utah would not presume to make law for the people and courts of Colorado!

In conclusion, we respectfully submit that this Court should issue a writ of certiorari to the United States Court of Appeals for the Tenth Circuit.

H. Berman,
Joseph N. Lilly,
A. X. Erickson,
720 University Bldg.,
Denver, Colorado,
Attorneys for Petitioner.